

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MIKRON INDUSTRIES, INC.,

Plaintiff,

v.

HURD WINDOWS & DOORS, INC.,
et al.,

Defendants.

Case No. C07-532RSL

ORDER DENYING MOTION
FOR PROTECTIVE ORDER
REGARDING ESI

This matter comes before the Court on defendants' "Motion for Protective Order Regarding ESI." Dkt. #35. Relying on Fed. R. Civ. P. 26(b)(2), defendants ask the Court to shift the costs of defendants' remaining electronic discovery to plaintiff. Defendants allege that searching through their electronically stored information ("ESI") would generate substantial costs and yield cumulative results. Aside from the cost-shifting request, defendants raise no objection to discovery of their ESI. In response, plaintiff contends that defendants have not reasonably complied with discovery requests to date. In particular, plaintiff continues to seek communications relating to the inception and termination of plaintiff's business relationship with defendants.

Having reviewed the memoranda, declarations, and exhibits submitted by the parties, the Court finds that defendants failed to discharge their meet and confer obligation in good faith, as

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1 required by Fed. R. Civ. P. 26(c). Accordingly, defendants' motion for protective order
2 regarding ESI is DENIED for failure to comply with Rule 26(c).

3 The conference requirement of Rule 26(c) is imposed for the benefit of both the Court
4 and the parties and is intended to ensure that only genuine disagreements are brought before the
5 Court. In the circumstances presented here, compliance with the Rule would have involved a
6 more substantive discussion regarding defendants' difficulty in producing responsive ESI, the
7 extent to which defendants have searched ESI to date, and the foundation for defendants' belief
8 that a more thorough search of ESI, including backup tapes, would yield only information that
9 has already been produced. Plaintiff's counsel stated that no meaningful discussion of these
10 issues took place before the motion was filed, and defendants have submitted no evidence to
11 dispute this fact. Instead, plaintiff's counsel received no response when it identified specific
12 "gaps" in production and reasonably asked defendants to articulate the foundation for their
13 assertion that unsearched ESI would produce "little additional responsive information." See Dkt.
14 #39 (Skok Decl.) at ¶13; Dkt. #39, Ex. H. A conversation with opposing counsel does not
15 become a "meet and confer" conference simply because a party has attached that label to the
16 discussion.

17 Even considering defendants' arguments on their merits, the Court finds that defendants
18 have not met their burden of demonstrating that plaintiff's discovery requests are unduly
19 burdensome and/or cumulative. The rules of discovery presume that "the responding party must
20 bear the expense of complying with discovery requests." Oppenheimer Fund, Inc. v. Sanders,
21 437 U.S. 340, 358 (1978). Congress added Fed. R. Civ. P. 26(b)(2)(B)¹ in 2006 in response to

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23 ¹ Fed. R. Civ. P. 26(b)(2)(B) provides: "A party need not provide discovery of electronically
24 stored information from sources that the party identifies as not reasonably accessible because of undue
25 burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery
26 is sought must show that the information is not reasonably accessible because of undue burden or cost. If
that showing is made, the court may nonetheless order discovery from such sources if the requesting

1 concerns that the broad discovery principle announced in Fed. R. Civ. P. 26(b)(1) could cause
2 responding parties to incur unreasonable costs in producing electronically stored information.
3 See Advisory Committee's Notes on 2006 Amendment to Fed. R. Civ. P. 26(b)(2). The
4 responding party bears the burden of showing that "identified sources are not reasonably
5 accessible in light of the burdens and costs required to search for, retrieve, and produce
6 whatever responsive information may be found." Id. In meeting this burden, the responding
7 party should present details sufficient to allow the requesting party to evaluate the costs and
8 benefits of searching and producing the identified sources. Id. This requirement mirrors the
9 "meet and confer" obligation established by Fed. R. Civ. P. 26(c). If the responding party meets
10 its burden, the court may consider a range of options, including cost-shifting, to alleviate the
11 responding party's hardship. Fed. R. Civ. P. 26(c)(1). See Oppenheimer Fund, 437 U.S. at 358.

12 ESI can be preserved in a wide range of diverse formats, some of which are more
13 accessible than others. See Zubulake v. UBS Warburg LLC, 217 F.R.D. 309, 318-20 (S.D.N.Y.
14 2003). Although defendants directed their employees to search their hard drives for responsive
15 information, Dkt. #36 (Lex Decl.) at ¶3, defendants have not demonstrated any search efforts
16 beyond that limited inquiry. Responsive information may be discovered during a more thorough
17 search of defendants' non-backup ESI, including employee hard drives and active e-mail servers.
18 Cost-shifting would not be appropriate in the context of this kind of search, as this ESI is
19 considered reasonably accessible within the meaning of Fed. R. Civ. P. 26(b)(2)(C). See id.

20 With regard to ESI located on defendants' backup tapes, those courts that considered
21 shifting the costs of electronic discovery to the requesting party were presented with more
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25 party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify
26 conditions for the discovery."

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1 detailed information than that provided by the defendants in this case.² In alleging that
2 continued discovery of their ESI would be unduly burdensome, defendants offer little evidence
3 beyond a cost estimate and conclusory characterizations of their ESI as “inaccessible.”
4 Defendants have not provided the Court with details regarding, for example: (1) the number of
5 back-up tapes to be searched; (2) the different methods defendants use to store electronic
6 information; (3) defendants’ electronic document retention policies prior to retaining an outside
7 consultant; (4) the extent to which the electronic information stored on back-up tapes overlaps
8 with electronic information stored in more accessible formats; or (5) the extent to which the
9 defendants have searched ESI that remains accessible. Beyond the estimated costs, defendants
10 have not demonstrated an unusual hardship beyond that which ordinarily accompanies the
11 discovery process. Therefore, the Court finds that defendants have not met their burden of
12 demonstrating that the requested ESI is “not reasonably accessible because of undue burden or
13 cost.”³ See Fed. R. Civ. P. 26(b)(2)(B).

14 The Court also finds that plaintiff’s requested discovery is neither “unreasonably
15 cumulative or duplicative” nor outweighed by its likely benefit within the meaning of Fed. R.
16 Civ. P. 26(b)(2)(C). In conclusory language, defendants assert that their ESI contains
17 cumulative information of little value to plaintiff. Defendants’ representation that responsive
18 documents relating to their relationship with plaintiff exist primarily in paper form, Dkt. #36
19 (Lex Decl.) at ¶4, appears largely speculative. The Court finds that defendants have not
20 provided plaintiff with sufficient information to evaluate whether a search of defendants’ ESI
21 would be cumulative. See Dkt. #39 (Skok Decl.) at ¶13; Dkt. #39, Ex. H.

22 ² See generally Semsroth v. City of Wichita, 239 F.R.D. 630 (D. Kan. 2006); Zubulake, 217
23 F.R.D. 309 (S.D.N.Y. 2003); Rowe Entertainment, Inc. v. William Morris Agency, Inc., 205 F.R.D. 421
24 (S.D.N.Y. 2002).

25 ³ Because defendants have not met their threshold burden to show undue burden or cost, the
26 Court will not apply the cost-shifting factors proposed by Zubulake, 217 F.R.D. at 322-24.

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2 For all the foregoing reasons, defendants' motion for protective order regarding ESI is
3 DENIED. The parties shall meet and confer regarding discovery of ESI before any related
4 motions will be considered by the Court.
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7 Dated this 21st day of April, 2008.
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10 Robert S. Lasnik
11 United States District Judge
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